

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LOUANN VICTORIA BAUMAN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

CASE NO. C15-0066-TSZ-MAT

REPORT AND RECOMMENDATION  
RE: SOCIAL SECURITY DISABILITY  
APPEAL

Plaintiff Louann Victoria Bauman proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be AFFIRMED.

**FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1954.<sup>1</sup> She has two years of college education and previously worked as a pharmacy technician. (AR 315-16.)

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<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 Plaintiff protectively filed an application for DIB on November 16, 2010, alleging  
2 disability beginning March 15, 2010. (AR 103, 252-58.) Her application was denied at the  
3 initial level and on reconsideration, and she timely requested a hearing. (AR 119-24, 131-34.)

4 On March 19, 2012, and October 17, 2012, ALJ Ilene Sloan held hearings, taking  
5 testimony from Plaintiff and a vocational expert (VE). (AR 38-100.) On June 27, 2013, the ALJ  
6 issued a decision finding Plaintiff not disabled. (AR 20-31.)

7 Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on  
8 November 19, 2014 (AR 1-4), making the ALJ's decision the final decision of the  
9 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

#### 10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

#### 12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining  
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
15 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not  
16 worked since her alleged onset date. (AR 22.) At step two, it must be determined whether a  
17 claimant suffers from a severe impairment. The ALJ found severe Plaintiff's chronic pain  
18 syndrome and degenerative disc disease at L5-S1. (AR 23-25.) Step three asks whether a  
19 claimant's impairments meet or equal a listed impairment. The ALJ found that Plaintiff's  
20 impairments did not meet or equal the criteria of a listed impairment. (AR 25.)

21 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess  
22 residual functional capacity (RFC) and determine at step four whether the claimant demonstrated  
23 an inability to perform past relevant work. The ALJ found Plaintiff able to lift 25 pounds

1 occasionally and 10 pounds frequently, stand and walk for six out of eight hours per workday,  
2 and sit for six out of eight hours per workday. Plaintiff can occasionally climb ramps and stairs,  
3 but can never climb ladders, ropes, or scaffolds. She can occasionally balance, stoop, kneel,  
4 crouch, and crawl. She can occasionally push or pull with her lower extremities. (AR 25-31.)  
5 With that assessment, the ALJ found Plaintiff able to perform her past relevant work as a  
6 pharmacy technician as generally performed. (AR 31.)

7 This Court's review of the ALJ's decision is limited to whether the decision is in  
8 accordance with the law and the findings supported by substantial evidence in the record as a  
9 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
10 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
11 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747,  
12 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the  
13 ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954  
14 (9th Cir. 2002).

15 Plaintiff argues the ALJ erred in (1) finding at step two that fibromyalgia and general  
16 osteoarthritis are not medically determinable, and depression and anemia are not severe, and not  
17 addressing thalassemia; (2) assessing medical opinions provided by a treating physician, a  
18 consultative examining physician, and a State agency physician; and (3) assessing Plaintiff's  
19 RFC, by failing to account for limitations established by the rejected evidence or caused by her  
20 medication side effects. She asks that the ALJ's decision be reversed and implicitly requests that  
21 her claim remanded for an award of benefits or, in the alternative, for further proceedings. Dkt.  
22 15 at 17-18. The Commissioner argues the ALJ's decision is supported by substantial evidence  
23 and should be affirmed.

Step Two

Plaintiff argues that the ALJ erred at step two in assessing her impairments, specifically in finding some conditions to be not medically determinable, others not severe, and failing to address one altogether.

At step two, a claimant must make a threshold showing that his or her medically determinable impairments significantly limit his or her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987); 20 C.F.R. §§ 404.1520(c), 416.920(c). “Basic work activities” refers to “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b), 416.921(b). “An impairment or combination of impairments can be found ‘not severe’ only if the evidence establishes a slight abnormality that has ‘no more than a minimal effect on an individual’s ability to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting Social Security Ruling (SSR) 85-28, 1985 WL 56856, at \*3 (Jan. 1, 1985)).

A severe mental or physical impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques, and established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by the claimant’s statement of symptoms. 20 C.F.R. §§ 404.1508, 416.908. “Symptoms” are the claimant’s own description of his or her physical or mental impairment. *Id.* at 404.1528(a), 414.928(a). “Signs” are “anatomical, physiological, or psychological abnormalities which can be observed, apart from the claimant’s statements (symptoms).” *Id.* at 404.1528(b), 414.928(b). “Signs must be shown by medically acceptable clinical diagnostic techniques.” *Id.* “Psychiatric signs are medically demonstrable phenomena that indicate specific psychological abnormalities, e.g., abnormalities of behavior, mood, thought, memory, orientation, development, or perception[,]” and “must also be shown by

1 observable facts that can be medically described and evaluated. *Id.* “Laboratory findings” are  
2 “anatomical, physiological, or psychological phenomena which can be shown by the use of  
3 medically acceptable laboratory diagnostic techniques.” *Id.* at 404.1528(c), 414.928(c).

#### 4 Fibromyalgia

5 Plaintiff argues that the ALJ erred in finding that fibromyalgia was not a medically  
6 determinable impairment. The Social Security Administration has published a ruling explaining  
7 what findings are necessary to establish fibromyalgia as a medically determinable impairment.  
8 *See* SSR 12-2p, 2012 WL 3104869, at \*2-3 (Jul. 25, 2012) (setting forth alternate sets of  
9 diagnostic criteria). The ALJ in this case referenced the diagnostic criteria as set forth in SSR  
10 12-2p, and explained why she found that although the record contained references to  
11 fibromyalgia, it did not contain the requisite findings to corroborate the diagnosis. (AR 23.) The  
12 ALJ also identified evidence that contradicts Plaintiff’s treatment physician’s fibromyalgia  
13 diagnosis. (AR 23 (citing AR 498).) As a result, the ALJ found that fibromyalgia was not a  
14 medically determinable impairment. (AR 23.)

15 Plaintiff argues that the ALJ erred in rejecting fibromyalgia as a medically determinable  
16 impairment without first further developing the record. Dkt. 15. She does not acknowledge,  
17 however, that she bears the burden to prove that her impairments are disabling. *Miller v.*  
18 *Heckler*, 770 F.2d 845, 849 (9th Cir. 1985). Although the SSR cited by Plaintiff provides that an  
19 ALJ *may* further develop the record regarding fibromyalgia, she has not established that the ALJ  
20 breached her duty to do so in this case. *See* SSR 12-2p, 2012 WL 3104869, at \*4; *Mayes v.*  
21 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (“An ALJ’s duty to develop the record further  
22 is triggered only when there is ambiguous evidence or when the record is inadequate to allow for  
23 proper evaluation of the evidence.”). The ALJ did not find that the evidence was ambiguous or

1 inadequate, and thus the duty to develop was not triggered here. Plaintiff has not established  
2 error in the ALJ's step-two finding as to fibromyalgia.

### 3 General Osteoarthritis

4 The ALJ noted that Plaintiff's treating physician diagnosed general osteoarthritis, but that  
5 the record did not contain any corroborating "objective findings, imaging, or laboratory tests[.]"  
6 (AR 24.) As a result, the ALJ found that general osteoarthritis was not a medically determinable  
7 impairment. (*Id.*) In challenging this finding, Plaintiff essentially reiterates her argument as to  
8 fibromyalgia, arguing that the ALJ should have recontacted her treating physician in order to  
9 develop the record as to general osteoarthritis. Dkt. 15 at 5. As explained in the previous  
10 section, Plaintiff has not established that the ALJ's duty to further develop the record was  
11 triggered here, because the ALJ did not find that the record was either ambiguous or inadequate  
12 to allow for proper evaluation of the evidence. Accordingly, Plaintiff has not established error in  
13 the ALJ's step-two finding as to general osteoarthritis.

### 14 Depression, Anemia, and Thalessemia

15 Plaintiff assigns error to the ALJ's findings as to depression, anemia, and thalessemia, but  
16 provides no analysis as to why the ALJ erred. (Dkt. 15 at 1, 8.) Plaintiff's bare contentions are  
17 insufficient, and to the extent that she provided additional argument for the first time on reply  
18 (Dkt. 17), she further failed to properly raise these issues on appeal. *See Indep. Towers of Wash.*  
19 *v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (declining to address assertions  
20 unaccompanied by legal arguments: "We require contentions to be accompanied by reasons.");  
21 *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("[A]rguments not  
22 raised by a party in an opening brief are waived.").

23 Accordingly, the Court recommends that the ALJ's step-two findings should be affirmed.

Medical Opinion Evidence

Plaintiff assigns error to the ALJ's rejection of December 2011 and October 2012 opinions provided by her treating physician, Peter Mohai, M.D. Dr. Mohai opined that Plaintiff's impairments restricted her to less than sedentary work (AR 506), and reiterated this opinion in more detail (AR 539-45). The ALJ provided several reasons to discount the opinions: (1) Dr. Mohai opined that non-medically determinable impairments and non-severe impairments were disabling; (2) Dr. Mohai's opinions are not supported by his treatment records, "which document no more than superficial examinations of the claimant" and reference "normal gait and grossly intact motor and sensory functioning throughout the upper and lower extremities"; (3) the contrary opinion of consultative examiner Robert Burdick, M.D., is "buttressed by comprehensive physical examination findings" and evidences Plaintiff's symptom magnification; (4) Dr. Mohai's opinion relies on Plaintiff's non-credible self-report, as evidenced by his wholesale adoption of her self-reported limitations (AR 30 (citing AR 539)); (5) Dr. Mohai opined that Plaintiff began to have difficulty sustaining work as early as April 2008, but the record shows that Plaintiff worked 32-36 hours/week from October 2008 through March 2010, and that this job ended for reasons unrelated to her impairments; and (6) even though Dr. Mohai opined that Plaintiff could not work at all since May 2009, Plaintiff certified in unemployment benefits applications in September 2010 and September 2011 that she was able to work full-time (AR 380, 385). (AR 30-31.)

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another physician, a treating or examining physician's opinion may be rejected

1 only for “‘clear and convincing’” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396  
2 (9th Cir. 1991)). Where contradicted, a treating or examining physician’s opinion may not be  
3 rejected without “‘specific and legitimate reasons’ supported by substantial evidence in the  
4 record for so doing.” *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.  
5 1983)). The ALJ may reject physicians’ opinions “by setting out a detailed and thorough  
6 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and  
7 making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881  
8 F.2d at 751). Rather than merely stating her conclusions, the ALJ “must set forth [her] own  
9 interpretations and explain why they, rather than the doctors’, are correct.” *Id.* (citing *Embrey v.*  
10 *Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

11 Most of the ALJ’s reasons are specific and legitimate. The ALJ erred to the extent she  
12 discounted Dr. Mohai’s opinions due to their references to impairments she found to be not  
13 severe, because an ALJ must consider all limitations, including non-severe limitations, when  
14 assessing a claimant’s RFC. 20 C.F.R. §§ 404.1545(e), 416.945(e). But the ALJ’s other reasons  
15 are specific and legitimate. The ALJ did not err in noting that Dr. Mohai’s treatment notes did  
16 not corroborate his opinions: the ALJ specifically identified examination findings that contradict  
17 Dr. Mohai’s opinion, namely his finding that Plaintiff’s motor and sensory functioning was intact  
18 in her upper and lower extremities (AR 509, 515, 533). Dr. Mohai’s treatment notes do not  
19 contain strength testing to support his opinion regarding Plaintiff’s ability to lift or carry, for  
20 example, and Dr. Mohai cited no specific findings to support his opinion in that regard. (AR  
21 541-42.)

22 Furthermore, as found by the ALJ, Dr. Mohai’s opinions do reflect a reliance on  
23 Plaintiff’s self-report (AR 539 (citing Plaintiff’s self-report as the basis for limitations)), and



1 Plaintiff does not challenge the ALJ's adverse credibility determination. Dr. Mohai did not cite  
2 specific findings that support his opinion as to Plaintiff's limitations, and thus the ALJ was  
3 entitled to discount Dr. Mohai's opinion to the extent he relied on Plaintiff's non-credible self-  
4 reporting. *See Ghanim v. Colvin*, 763 F.3d 1154, 1162-63 (9th Cir. 2014) (holding that an ALJ  
5 may reject treating provider's opinions if based "to a large extent" on discredited self-reports and  
6 not clinical evidence).

7 The ALJ also cited specific ways in which Dr. Mohai's opinions were contradicted by  
8 evidence related to Plaintiff's work history and statements about her ability to work, and these  
9 are legitimate reasons to discount Dr. Mohai's opinions. Although Plaintiff cites evidence that  
10 she contends shows that her work activity was unsuccessful, and thus should not have been held  
11 against her, the evidence cited is not inconsistent with the ALJ's findings that Plaintiff worked  
12 from October 2008 until March 2010, and that her work ended for reasons unrelated to her  
13 impairments. *See* AR 358-59 (statement from Plaintiff's employer, Bellegrove Pharmacy); *see*  
14 *also* AR 380, 385 (Plaintiff's statements that her Bellegrove Pharmacy job ended because she  
15 was laid off due to lack of work, or because the business closed). These are legitimate reasons  
16 to discount Dr. Mohai's opinions. *See* 20 C.F.R. §404.1505 (defining "disability" as the inability  
17 to work due to a medically determinable impairment).

18 The ALJ also cited inconsistent medical evidence as a reason to discount Dr. Mohai's  
19 opinion, and explained why she afforded more weight to Dr. Burdick's opinion than Dr.  
20 Mohai's. (AR 30.) The ALJ did not err in favoring Dr. Burdick's opinion as better supported by  
21 examination findings, because Dr. Burdick performed a physical examination. (AR 496-98.)  
22 Contrary medical evidence is a legitimate reason to discount Dr. Mohai's opinions. *See*  
23 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (finding it not improper to reject an

1 opinion presenting inconsistencies between the opinion and the medical record).<sup>2</sup>

2 Because the ALJ provided multiple specific and legitimate reasons to discount Dr.  
3 Mohai's opinions, the ALJ's decision in that respect should be affirmed.

4 Plaintiff goes on to argue that the ALJ erred in relying on the opinions of the consultative  
5 examiner and State agency medical consultant (Dkt. 15 at 14-15), but this argument is not  
6 persuasive. That the examining physician did not review Plaintiff's entire medical history does  
7 not invalidate the physician's opinion. *See Walshe v. Barnhart*, 70 Fed. Appx. 929, 931 (9th Cir.  
8 2003) ("... Social Security regulations do not require that a consulting physician review all of  
9 the claimant's background records[.]"). Furthermore, although Plaintiff argues that the ALJ  
10 erred in finding that the Waddell's signs observed by Dr. Burdick "buttressed" his opinion, the  
11 ALJ did not so find: she indicated that Dr. Burdick's opinion was buttressed by his  
12 "comprehensive physical examination findings." (AR 30.) Dr. Burdick did perform a physical  
13 examination, which supported his ultimate conclusion. (AR 497-98.) That Plaintiff interprets  
14 Dr. Burdick's findings regarding Waddell's signs and inconsistent conduct regarding guarding  
15 (AR 497-98) differently than the ALJ does not establish that the ALJ's inferences were not  
16 reasonable, and thus does not establish error. *Morgan v. Comm'r of Social Sec. Admin.*, 169  
17 F.3d 595, 599 (9th Cir. 1999) ("Where the evidence is susceptible to more than one rational  
18 interpretation, it is the ALJ's conclusion that must be upheld.").

19 Finally, Plaintiff argues that the ALJ could not rely on a non-examining physician's  
20 opinion as a basis to reject a treating physician's opinion. Dkt. 15 at 16. The ALJ in this case  
21 did not cite a non-examining physician's opinion as a reason to discount Dr. Mohai's opinion,

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23 <sup>2</sup> Plaintiff's last challenge to the ALJ's reasoning regarding Dr. Mohai's opinions addresses  
impropriety, but this appears to be a typographical error. Dkt. 15 at 13 (referencing a "Dr. Stevenson").

1 however. Plaintiff has failed to establish error in the ALJ's assessment of the State agency  
 2 physician's opinion

### 3 Other Issues

4 Plaintiff's arguments regarding step three and the RFC assessment depend on her  
 5 arguments regarding step two and the medical opinion evidence, which should be rejected for the  
 6 reasons explained herein. Dkt. 15 at 16-17. Plaintiff also argues that the ALJ erred in failing to  
 7 account for her allegations of pain and medication side effects (Dkt. 15 at 17), but the fact that  
 8 she does not challenge the ALJ's adverse credibility determination is fatal to this argument. *See*  
 9 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217-18 (9th Cir. 2005) (holding that an RFC assessment or  
 10 VE hypothetical need not account for limitations or impairments that the ALJ properly rejected);  
 11 *Britton v. Colvin*, \_\_\_ F.3d \_\_\_, available at 2015 WL 3461472, at \*2 (9th Cir. Jun. 2, 2015)  
 12 (holding that where a claimant is not credible, an ALJ need not account for limitations  
 13 established only by a claimant's self-report in a VE hypothetical)

### 14 CONCLUSION

15 For the reasons set forth above, the Court recommends that this matter be AFFIRMED.

### 16 DEADLINE FOR OBJECTIONS

17 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
 18 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and  
 19 Recommendation is signed. Failure to file objections within the specified time may affect your  
 20 right to appeal. Objections should be noted for consideration on the District Judge's motions  
 21 calendar for the third Friday after they are filed. Responses to objections may be filed within  
 22 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will

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1 be ready for consideration by the District Judge on **July 3, 2015**.

2 DATED this 12th day of June, 2015.

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5 Mary Alice Theiler  
6 United States Magistrate Judge  
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